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Union Calendar No. 813

96TH CONGRESS
2D SESSION

H. R. 4736

[Report No. 96-831, Parts I and II]

To establish certain pretrial and trial procedures for the use of classified information in connection with Federal criminal cases, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 11, 1979

Mr. MURPHY of Illinois (for himself, Mr. BOLAND, Mr. MCCLORY, Mr. ZABLOCKI, Mr. BURLISON, Mr. ASPIN, Mr. ROSE, Mr. MAZZOLI, Mr. MINETA, Mr. FOWLER, and Mr. DANIELSON) introduced the following bill; which was referred jointly to the Committee on the Judiciary and the Permanent Select Committee on Intelligence

MARCH 18, 1980

Reported from the Permanent Select Committee on Intelligence with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

SEPTEMBER 17, 1980

Additional sponsor: Mr. HYDE

SEPTEMBER 17, 1980

Reported from the Committee on the Judiciary with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in boldface roman]

[For text of the introduced bill, see copy of bill as introduced on July 18, 1980]

A BILL

To establish certain pretrial and trial procedures for the use of classified information in connection with Federal criminal cases, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 *That this Act may be cited as the "Classified Information*
4 *Criminal Trial Procedures Act".*

5 *TITLE I—PROCEDURES FOR DISCLOSURE OF*
6 *CLASSIFIED INFORMATION IN CRIMINAL*
7 *CASES*

8 *PRETRIAL CONFERENCES*

9 *SEC. 101. At any time after the filing by the United*
10 *States of an indictment or information in a United States*
11 *district court, any party to the case may request a pretrial*
12 *conference to consider matters relating to classified informa-*
13 *tion that may arise in connection with the prosecution. Upon*
14 *such a request, the court shall promptly hold a pretrial con-*
15 *ference to establish a schedule for any request for discovery of*
16 *classified information and for the implementation of the pro-*
17 *cedures established by this title. In addition, at such a pre-*
18 *trial conference the court may consider any other matter*
19 *which may promote a fair and expeditious trial. No admis-*
20 *sion made by the defendant or by any attorney for the de-*
21 *fendant at such a conference may be used against the defend-*

1 *ant unless the admission is in writing and is signed by the*
2 *defendant and by the attorney for the defendant.*

3 *PROCEDURES FOR DISCLOSURE OF CLASSIFIED*
4 *INFORMATION*

5 *SEC. 102. (a)(1) Whenever a defendant in any Federal*
6 *prosecution intends to take any action to disclose or cause the*
7 *disclosure of classified information in any manner in connec-*
8 *tion with such prosecution, the defendant shall, before such*
9 *disclosure and before the trial or any pretrial hearing, notify*
10 *the court and the attorney for the United States of such in-*
11 *tention and shall not disclose or cause the disclosure of such*
12 *information unless authorized to do so by the court in accord-*
13 *ance with this title. Such notice shall include a brief descrip-*
14 *tion of the classified information that is the subject of such*
15 *notice.*

16 *(2)(A) Within ten days of receiving a notification under*
17 *paragraph (1), the United States, by written petition of the*
18 *Attorney General, may request the court to conduct a pro-*
19 *ceeding to make all determinations concerning the use, rel-*
20 *evance, or admissibility of the classified information at issue*
21 *that would otherwise be made during the trial or a pretrial*
22 *hearing. Upon such a request, the court shall conduct such a*
23 *proceeding.*

24 *(B) Any proceeding held pursuant to a request under*
25 *subparagraph (A) (or any portion of such proceeding speci-*

1 *fied in the request of the Attorney General) shall be held in*
2 *camera if the Attorney General certifies to the court in such*
3 *petition that a public proceeding may result in the disclosure*
4 *of classified information.*

5 *(C) If a request for a proceeding under this subsection*
6 *is not made within ten days or if, at the close of such a*
7 *proceeding, the determination of the court regarding the use,*
8 *relevance, or admissibility of the classified information at*
9 *issue is favorable to the defendant, the court shall authorize*
10 *the defendant to disclose or cause the disclosure of the classi-*
11 *fied information at the trial or at any pretrial hearing, but*
12 *such disclosure may not be made before the time for the*
13 *United States to appeal such determination under section*
14 *108 has expired. If the United States takes such an appeal,*
15 *such disclosure may not be made until such appeal is*
16 *decided.*

17 *(b)(1) Whenever a defendant in a Federal prosecution*
18 *intends to take any action to disclose or cause the disclosure,*
19 *during the trial or any pretrial hearing, of any classified*
20 *information and the defendant has not given notice under*
21 *subsection (a)(1) with respect to such disclosure because the*
22 *interest of the defendant in such disclosure reasonably could*
23 *not have been anticipated before the expiration of the time for*
24 *giving such notice, the defendant shall, before taking such*
25 *action, notify the court and the attorney for the United States*

1 of such intention and shall not disclose or cause the disclo-
2 sure of such information unless authorized by the court to do
3 so in accordance with this title. Such notice shall include a
4 brief description of the classified information that is the sub-
5 ject of such notice.

6 (2)(A) Within forty-eight hours of the receipt of a notifi-
7 cation under paragraph (1), the United States, by written
8 petition of the Attorney General, may request the court to
9 conduct a proceeding to make all determinations concerning
10 the use, relevance, or admissibility of the classified informa-
11 tion at issue. Upon such a request, the court shall conduct
12 such a proceeding.

13 (B) Any proceeding held pursuant to a request under
14 subparagraph (A) (or any portion of such proceeding speci-
15 fied in the request of the Attorney General) shall be held in
16 camera if the Attorney General certifies to the court in such
17 petition that a public proceeding may result in the disclosure
18 of classified information.

19 (C) If a request for a proceeding under this subsection
20 is not made within forty-eight hours or if, at the close of such
21 a proceeding, the determination of the court regarding the
22 use, relevance, or admissibility of the classified information
23 at issue is favorable to the defendant, the court, subject to the
24 provisions of section 106, shall authorize the defendant to
25 disclose or cause the disclosure of the classified information

1 *at the trial or any pretrial hearing, but such disclosure may*
2 *not be made before the time for the United States to appeal*
3 *such determination under section 108 has expired. If the*
4 *United States takes such an appeal, such disclosure may not*
5 *be made until such appeal is decided. In any order of the*
6 *court under this subsection that is favorable to the defendant,*
7 *the court shall specify the time to be allowed the United*
8 *States to appeal such order under section 108.*

9 (c)(1) *At any time before or during trial the United*
10 *States, by written petition of the Attorney General, may re-*
11 *quest the court to conduct a proceeding to make all determi-*
12 *nations concerning the use, relevance, or admissibility of*
13 *classified information which has not been the subject of*
14 *notice under subsection (a)(1) or (b)(1). Upon such a request,*
15 *the court shall conduct such a proceeding.*

16 (2) *Any proceeding held pursuant to a request under*
17 *paragraph (1) (or any portion of such proceeding specified in*
18 *the request of the Attorney General) shall be held in camera*
19 *if the Attorney General certifies to the court in such petition*
20 *that a public proceeding may result in the disclosure of clas-*
21 *sified information.*

22 (3) *If, at the close of a proceeding held pursuant to this*
23 *subsection, the determination of the court regarding the use,*
24 *relevance, or admissibility of the classified information at*
25 *issue is favorable to the defendant, the court, subject to the*

1 provisions of section 106, shall authorize the defendant to
2 disclose or cause the disclosure of the classified information
3 at the trial or at any pretrial hearing, but such disclosure
4 may not be made before the time for the United States to
5 appeal such determination under section 108 has expired. If
6 the United States takes such an appeal, such disclosure may
7 not be made until such appeal is decided. In any order of the
8 court under this subsection that is favorable to the defendant,
9 the court shall specify the time to be allowed the United
10 States to appeal such order under section 108.

11 (d) Upon receiving a request from the United States for
12 a proceeding under subsection (a)(2), (b)(2), or (c)(1), the
13 court shall issue an order prohibiting the defendant from dis-
14 closing or causing the disclosure of the classified information
15 at issue pending conclusion of the proceeding.

16 (e) Before any proceeding is conducted pursuant to a
17 request by the United States under subsection (a)(2), (b)(2),
18 or (c)(1), the United States shall provide the defendant with
19 notice of the classified information that is at issue. Such
20 notice shall identify the specific classified information at
21 issue whenever that information previously has been made
22 available to the defendant by the United States. When the
23 United States has not previously made the information avail-
24 able to the defendant, the information may be described by
25 generic category, in such form as the court may approve,

1 *rather than by identification of the specific information of*
2 *concern to the United States.*

3 (f) *During the examination of a witness by a defendant*
4 *in any criminal proceeding, the United States may object to*
5 *any question or line of inquiry that may require the witness*
6 *to disclose classified information not previously found to be*
7 *admissible in accordance with the procedures established by*
8 *this title. Upon such an objection, the court shall take such*
9 *action to determine whether the response is admissible as will*
10 *safeguard against the disclosure of any classified informa-*
11 *tion. Such action may include requiring the United States to*
12 *provide the court with a proffer of the response of the witness*
13 *to the question or line of inquiry anticipated by the United*
14 *States and requiring the defendant to provide the court with*
15 *a proffer of the nature of the information sought to be elicited.*

16 *ALTERNATIVE PROCEDURE FOR DISCLOSURE OF*
17 *CLASSIFIED INFORMATION*

18 *SEC. 103. (a) Upon any determination by the court au-*
19 *thorizing the disclosure of specific classified information*
20 *under the procedures established by section 102, the United*
21 *States may move that, in lieu of the disclosure of such spe-*
22 *cific classified information, the court order—*

23 (1) *the substitution for such classified information*
24 *of a statement admitting relevant facts that the specific*
25 *classified information would tend to prove; or*

1 (2) *the substitution for such classified information*
2 *of a summary of the specific classified information.*

3 *The court shall grant such a motion of the United States if it*
4 *finds that the statement or summary will provide the defend-*
5 *ant with substantially the same ability to make his defense*
6 *as would disclosure of the specific classified information. The*
7 *court shall hold a hearing on any motion under this section.*
8 *Any such hearing shall be held in camera at the request of*
9 *the Attorney General.*

10 (b) *The United States may, in connection with a motion*
11 *under subsection (a), submit to the court an affidavit of the*
12 *Attorney General certifying that disclosure of the classified*
13 *information would cause identifiable damage to the national*
14 *security of the United States and explaining the basis for the*
15 *classification of such information. If so requested by the*
16 *United States, the court shall examine such affidavit in*
17 *camera and ex parte.*

18 SEALING OF RECORDS OF IN CAMERA PROCEEDINGS

19 SEC. 104. *If at the close of an in camera proceeding*
20 *under this title (or any portion of a proceeding under this*
21 *title that is held in camera) the court determines that the*
22 *classified information at issue may not be disclosed or elic-*
23 *ited at the trial or any pretrial hearing, the record of such in*
24 *camera proceeding shall be sealed and preserved by the court*
25 *for use in the event of an appeal.*

1 *PROHIBITION ON DISCLOSURE OF CLASSIFIED INFORMA-*
2 *TION BY DEFENDANT, RELIEF FOR DEFENDANT*
3 *WHEN UNITED STATES OPPOSES DISCLOSURE*

4 *SEC. 105. (a) Whenever the court denies a motion by*
5 *the United States that it issue an order under section 103(a)*
6 *and the United States files with the court an affidavit of the*
7 *Attorney General objecting to disclosure of the classified in-*
8 *formation at issue, the court shall order that the defendant*
9 *not disclose or cause the disclosure of such information.*

10 *(b) Whenever a defendant is prevented by an order*
11 *under subsection (a) from disclosing or causing the disclosure*
12 *of classified information, the court shall dismiss the indict-*
13 *ment or information; except that, when the court determines*
14 *that the interests of justice would not be served by dismissal*
15 *of the indictment or information, the court shall order such*
16 *other action, in lieu of dismissing the indictment or informa-*
17 *tion, as the court determines is appropriate. Such action may*
18 *include—*

19 *(1) dismissing specified counts of the indictment*
20 *or information;*

21 *(2) finding against the United States on any*
22 *issue as to which the excluded classified information*
23 *relates; or*

24 *(3) striking or precluding all or any part of the*
25 *testimony of a witness.*

1 *FAILURE OF DEFENDANT TO PROVIDE PRETRIAL NOTICE*

2 *SEC. 106. If a defendant fails to comply with the notice*
3 *requirements of subsection (a) or (b) of section 102 and the*
4 *court finds that the defendant's need to disclose or cause the*
5 *disclosure of the classified information at issue reasonably*
6 *could have been anticipated before the expiration of the time*
7 *for giving such notice under such subsection, the court may*
8 *prohibit the defendant from disclosing or causing the disclo-*
9 *sure of such classified information during trial and may pro-*
10 *hibit the examination by the defendant of any witness with*
11 *respect to any such information.*

12 *RECIPROCITY; DISCLOSURE BY THE UNITED STATES OF*
13 *REBUTTAL EVIDENCE*

14 *SEC. 107. (a) Whenever the court determines, in ac-*
15 *cordance with the procedures prescribed in section 102, that*
16 *classified information may be disclosed in connection with a*
17 *criminal trial or pretrial hearing or issues an order pursuant*
18 *to section 103(a), the court shall—*

19 *(1) order the United States to provide the defend-*
20 *ant with the information it expects to use to rebut the*
21 *particular classified information at issue; and*

22 *(2) order the United States to provide the defend-*
23 *ant with the name and address of any witness it ex-*
24 *pects to use to rebut the particular classified informa-*
25 *tion at issue if, taking into account the nature and*

1 *extent of the defendant's disclosures, the probability of*
2 *harm to or intimidation or bribery of a witness, and*
3 *the probability of identifiable harm to the national se-*
4 *curity, the court determines that such order is*
5 *appropriate.*

6 *(b) If the United States fails to comply with an order*
7 *under subsection (a), the court, unless it finds that the use at*
8 *trial of information or a witness reasonably could not have*
9 *been anticipated, may exclude any evidence not made the*
10 *subject of a required disclosure and may prohibit the exami-*
11 *nation by the United States of any witness with respect to*
12 *such information.*

13 *(c) Whenever the United States requests a pretrial pro-*
14 *ceeding under section 102, the United States, upon request of*
15 *the defendant, shall provide the defendant with a bill of par-*
16 *ticulars as to the portions of the indictment or information*
17 *which the defendant identifies as related to the classified in-*
18 *formation at issue in the pretrial proceeding. The bill of par-*
19 *ticulars shall be provided before such proceeding.*

20 *(d) The provisions of this section shall not apply to*
21 *classified information provided by the United States to the*
22 *defendant pursuant to a discovery request, unless the court*
23 *determines that the interests of fairness so require.*

1 *APPEALS BY THE UNITED STATES*

2 *SEC. 108. (a) The United States may appeal to a court*
3 *of appeals before or during trial from any decision or order of*
4 *a district court in a criminal case requiring or authorizing*
5 *the production, disclosure, or use of classified information,*
6 *imposing sanctions for nondisclosure of classified informa-*
7 *tion, or denying the issuance of a protective order sought by*
8 *the United States to prevent the disclosure of classified infor-*
9 *mation, if the Attorney General certifies to the district court*
10 *that the appeal is not taken for purpose of delay.*

11 *(b)(1) If an appeal under this section is taken before the*
12 *trial has begun, the appeal shall be taken within ten days*
13 *after the date of the decision or order appealed from, and the*
14 *trial shall not commence until the appeal is decided.*

15 *(2) If an appeal under this section is taken during the*
16 *trial, the trial court shall adjourn the trial until the appeal is*
17 *resolved, and the court of appeals (A) shall hear argument on*
18 *such appeal within four days of the adjournment of the trial,*
19 *(B) may dispense with written briefs other than the support-*
20 *ing materials previously submitted to the trial court, (C)*
21 *shall render its decision within four days of argument on*
22 *appeal, and (D) may dispense with the issuance of a written*
23 *opinion in rendering its decision.*

24 *(c) Any appeal and decision under this section shall not*
25 *affect the right of the defendant, in a subsequent appeal from*

1 *a judgment of conviction, to claim as error reversal by the*
2 *trial court on remand of a ruling appealed from during trial.*

3 *PROTECTIVE ORDERS; DISCOVERY; INTRODUCTION OF*
4 *EVIDENCE*

5 *SEC. 109. (a) Upon motion of the United States, the*
6 *court shall issue an order to protect against the disclosure of*
7 *any classified information disclosed by the United States to*
8 *any defendant in any criminal case in a district court of the*
9 *United States.*

10 *(b) Whenever the court determines pursuant to rule 16*
11 *of the Federal Rules of Criminal Procedure that the defend-*
12 *ant is entitled to discover or inspect documents or materials*
13 *containing classified information, the court shall authorize*
14 *the United States to delete classified information from the*
15 *documents or materials to be made available to the defendant,*
16 *to substitute a summary of the classified information, or to*
17 *substitute a statement admitting relevant facts that the classi-*
18 *fied information would tend to prove, if the court finds that*
19 *such action will provide the defendant with substantially the*
20 *same ability to prepare for trial or make his defense as would*
21 *disclosure of the specific classified information. The court*
22 *may permit the United States to make a request for such*
23 *authorization in the form of a written statement to be in-*
24 *spected by the court alone. If the court enters an order grant-*
25 *ing relief following such an ex parte showing, the entire text*

1 *of the statement of the United States shall be sealed and*
2 *preserved in the records of the court to be made available to*
3 *the appellate court in the event of an appeal.*

4 (c) *Writings, recordings, and photographs containing*
5 *classified information may be admitted into evidence without*
6 *change in their classification status.*

7 (d) *When a writing or recorded statement (or a part*
8 *thereof) is introduced into evidence by the United States, the*
9 *court, upon motion of the defendant, may require the United*
10 *States at that time to introduce any other writing or recorded*
11 *statement (or any other part of the statement introduced)*
12 *which ought in fairness to be considered contemporaneously*
13 *with the statement introduced and which is relevant to the*
14 *defendant's case. If such other writing or recorded statement,*
15 *or such other part, contains classified information, the court,*
16 *at the request of the United States, shall conduct the hearing*
17 *on the defendant's motion in camera. If, at the conclusion of*
18 *such hearing, the court requires the United States to intro-*
19 *duce classified information, the procedures of section 103*
20 *shall apply.*

21 (e) *The United States may notify the court and the de-*
22 *fendant before trial if it intends to introduce during the trial*
23 *only a part of a writing or recorded statement containing*
24 *classified information. Upon such notification, the court*

1 *shall conduct, before the trial, an in camera proceeding to*
2 *make the determinations required by section 109(d).*

3 *SECURITY PROCEDURES*

4 *SEC. 110. (a) Within one hundred and twenty days of*
5 *the date of the enactment of this Act, the Chief Justice of the*
6 *United States, in consultation with the Attorney General*
7 *and the Director of Central Intelligence, shall prescribe rules*
8 *establishing procedures for the protection against unauthor-*
9 *ized disclosure of any classified information in the custody of*
10 *the United States district courts, courts of appeals, or Su-*
11 *preme Court. Such rules, and any changes in such rules,*
12 *shall be submitted to the appropriate committees of Congress*
13 *and shall become effective forty-five days after such*
14 *submission.*

15 *(b) Until such time as rules under subsection (a) first*
16 *become effective, the Federal courts shall in each case involv-*
17 *ing classified information adopt procedures to protect against*
18 *the unauthorized disclosure of such information.*

19 *IDENTIFICATION OF INFORMATION RELATED TO THE*
20 *NATIONAL DEFENSE*

21 *SEC. 111. In any prosecution in which the United*
22 *States must establish as an element of the offense that mate-*
23 *rial relates to the national defense or constitutes classified*
24 *information, the United States shall notify the defendant, at*
25 *the time of the pretrial conference or, if no such conference is*

1 *held, at a time before trial specified by the court, of the por-*
2 *tions of the material that it reasonably expects to rely upon to*
3 *establish such element of the offense.*

4 *FUNCTIONS OF ATTORNEY GENERAL MAY BE EXERCISED*
5 *BY DEPUTY ATTORNEY GENERAL AND A DESIGNAT-*
6 *ED ASSISTANT ATTORNEY GENERAL.*

7 *SEC. 112. The functions and duties of the Attorney*
8 *General under this title may be exercised by the Deputy At-*
9 *torney General and by an Assistant Attorney General desig-*
10 *nated by the Attorney General for such purpose and may not*
11 *be delegated to any other official.*

12 *DEFINITION*

13 *SEC. 113. As used in this title, the term "classified*
14 *information" means information or material that is desig-*
15 *nated and clearly marked or clearly represented, pursuant to*
16 *the provisions of a statute or Executive order (or a regulation*
17 *or order issued pursuant to a statute or Executive order), as*
18 *information requiring a specific degree of protection against*
19 *unauthorized disclosure for reasons of national security or*
20 *any Restricted Data, as defined in section 11 y. of the*
21 *Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).*

22 *TITLE II—GUIDELINES AND REPORTS*

23 *GUIDELINES PRESCRIBED BY THE ATTORNEY GENERAL*

24 *SEC. 201. Within ninety days of the date of the enact-*
25 *ment of this Act, the Attorney General shall issue guidelines*

1 *specifying the factors to be used by the Department of Justice*
2 *in deciding whether to prosecute a violation of Federal law in*
3 *which there is a possibility that classified information will be*
4 *disclosed. Such guidelines shall be promptly transmitted to*
5 *the appropriate committees of the Congress.*

6 *ANNUAL REPORT TO CONGRESS BY THE ATTORNEY*

7 *GENERAL*

8 *SEC. 202. The Attorney General shall report to the*
9 *Select Committee on Intelligence of the Senate and the Per-*
10 *manent Select Committee on Intelligence of the House of*
11 *Representatives once each year concerning the operation and*
12 *effectiveness of this Act. Such report shall include summaries*
13 *of those cases in which a decision not to prosecute or not to*
14 *continue a prosecution was made because of the possibility*
15 *that classified information would be disclosed.*

16 *TITLE III—EFFECTIVE DATE*

17 *SEC. 301. The provisions of this Act shall become effec-*
18 *tive upon the date of the enactment of this Act, but shall not*
19 *apply to any prosecution in which an indictment or informa-*
20 *tion was filed before such date.*

21 **That this Act may be cited as the "Classified Infor-**
22 **mation Criminal Trial Procedures Act".**

1 **TITLE I—PROCEDURES FOR DISCLOSURE**
2 **OF CLASSIFIED INFORMATION IN**
3 **CRIMINAL CASES**

4 **PRETRIAL CONFERENCES**

5 **SEC. 101.** At any time after the filing by the
6 United States of an indictment or information in a
7 United States district court, any party to the case
8 may request a pretrial conference to consider mat-
9 ters relating to classified information that may
10 arise in connection with the prosecution. Upon
11 such a request, the court shall promptly hold a
12 pretrial conference to establish a schedule for any
13 request for discovery of classified information and
14 for the implementation of the procedures estab-
15 lished by this title. In addition, at such a pretrial
16 conference the court may consider any other
17 matter which may promote a fair and expeditious
18 trial. No admission made by the defendant or by
19 any attorney for the defendant at such a confer-
20 ence may be used against the defendant unless the
21 admission is in writing and is signed by the de-
22 fendant and by the attorney for the defendant.

1 **PROCEDURES FOR DISCLOSURE OF CLASSIFIED**
2 **INFORMATION**

3 **SEC. 102. (a)(1) Whenever a defendant in any**
4 **Federal prosecution intends to take any action to**
5 **disclose or cause the disclosure of classified infor-**
6 **mation in any manner in connection with such**
7 **prosecution, the defendant shall, before such dis-**
8 **closure and before the trial or any pretrial hear-**
9 **ing, notify the court and the attorney for the**
10 **United States of such intention and shall not dis-**
11 **close or cause the disclosure of such information**
12 **unless authorized to do so by the court in accord-**
13 **ance with this title. Such notice shall include a**
14 **brief description of the classified information that**
15 **is the subject of such notice.**

16 **(2)(A) Within ten days of receiving a notifica-**
17 **tion under paragraph (1), the United States, by**
18 **written petition of the Attorney General, may re-**
19 **quest the court to conduct a proceeding to make**
20 **all determinations concerning the use, relevance,**
21 **or admissibility of the classified information at**
22 **issue that would otherwise be made during the**
23 **trial or a pretrial hearing. Upon such a request,**
24 **the court shall conduct such a proceeding.**

1 (B) Any proceeding held pursuant to a request
2 under subparagraph (A) (or any portion of such
3 proceeding specified in the request of the Attorney
4 General) shall be held in camera if the Attorney
5 General certifies to the court in such petition that
6 a public proceeding may result in the disclosure of
7 classified information.

8 (C) If a request for a proceeding under this
9 subsection is not made within ten days or if, at the
10 close of such a proceeding, the determination of
11 the court regarding the use, relevance, or admissi-
12 bility of the classified information at issue is fa-
13 vorable to the defendant, the court shall authorize
14 the defendant to disclose or cause the disclosure
15 of the classified information at the trial or at any
16 pretrial hearing, but such disclosure may not be
17 made before the time for the United States to
18 appeal such determination under section 108 has
19 expired. If the United States takes such an appeal,
20 such disclosure may not be made until such
21 appeal is decided.

22 (b)(1) Whenever a defendant in a Federal
23 prosecution intends to take any action to disclose
24 or cause the disclosure, during the trial or any
25 pretrial hearing, of any classified information and

1 the defendant has not given notice under subsec-
2 tion (a)(1) with respect to such disclosure because
3 the interest of the defendant in such disclosure
4 reasonably could not have been anticipated before
5 the expiration of the time for giving such notice,
6 the defendant shall, before taking such action,
7 notify the court and the attorney for the United
8 States of such intention and shall not disclose or
9 cause the disclosure of such information unless
10 authorized by the court to do so in accordance
11 with this title. Such notice shall include a brief de-
12 scription of the classified information that is the
13 subject of such notice.

14 (2)(A) Within forty-eight hours of the receipt
15 of a notification under paragraph (1), the United
16 States, by written petition of the Attorney Gener-
17 al, may request the court to conduct a proceeding
18 to make all determinations concerning the use,
19 relevance, or admissibility of the classified infor-
20 mation at issue. Upon such a request, the court
21 shall conduct such a proceeding.

22 (B) Any proceeding held pursuant to a request
23 under subparagraph (A) (or any portion of such
24 proceeding specified in the request of the Attorney
25 General) shall be held in camera if the Attorney

1 General certifies to the court in such petition that
2 a public proceeding may result in the disclosure of
3 classified information.

4 (C) If a request for a proceeding under this
5 subsection is not made within forty-eight hours or
6 if, at the close of such a proceeding, the determi-
7 nation of the court regarding the use, relevance,
8 or admissibility of the classified information at
9 issue is favorable to the defendant, the court, sub-
10 ject to the provisions of section 106, shall author-
11 ize the defendant to disclose or cause the disclo-
12 sure of the classified information at the trial or
13 any pretrial hearing, but such disclosure may not
14 be made before the time for the United States to
15 appeal such determination under section 108 has
16 expired. If the United States takes such an appeal,
17 such disclosure may not be made until such appeal
18 is decided. In any order of the court under this
19 subsection that is favorable to the defendant, the
20 court shall specify the time to be allowed the
21 United States to appeal such order under section
22 108.

23 (c)(1) At any time before or during trial the
24 United States, by written petition of the Attorney
25 General, may request the court to conduct a pro-

1 ceeding to make all determinations concerning the
2 use, relevance, or admissibility of classified infor-
3 mation which has not been the subject of notice
4 under subsection (a)(1) or (b)(1). Upon such a re-
5 quest, the court shall conduct such a proceeding.

6 (2) Any proceeding held pursuant to a request
7 under paragraph (1) (or any portion of such pro-
8 ceeding specified in the request of the Attorney
9 General) shall be held in camera if the Attorney
10 General certifies to the court in such petition that
11 a public proceeding may result in the disclosure of
12 classified information.

13 (3) If, at the close of a proceeding held pursu-
14 ant to this subsection, the determination of the
15 court regarding the use, relevance, or admissibility
16 of the classified information at issue is favorable
17 to the defendant, the court, subject to the provi-
18 sions of section 106, shall authorize the defendant
19 to disclose or cause the disclosure of the classified
20 information at the trial or at any pretrial hearing,
21 but such disclosure may not be made before the
22 time for the United States to appeal such determi-
23 nation under section 108 has expired. If the United
24 States takes such an appeal, such disclosure may
25 not be made until such appeal is decided. In any

1 order of the court under this subsection that is fa-
2 vorable to the defendant, the court shall specify
3 the time to be allowed the United States to appeal
4 such order under section 108.

5 (d) Upon receiving a request from the United
6 States for a proceeding under subsection (a)(2),
7 (b)(2), or (c)(1), the court shall issue an order pro-
8 hibiting the defendant from disclosing or causing
9 the disclosure of the classified information at
10 issue pending conclusion of the proceeding.

11 (e) Before any proceeding is conducted pursu-
12 ant to a request by the United States under subsec-
13 tion (a)(2), (b)(2), or (c)(1), the United States shall
14 provide the defendant with notice of the classified
15 information that is at issue. Such notice shall
16 identify the specific classified information at issue
17 whenever that information previously has been
18 made available to the defendant by the United
19 States. When the United States has not previously
20 made the information available to the defendant,
21 the information may be described by generic cate-
22 gory, in such form as the court may approve,
23 rather than by identification of the specific infor-
24 mation of concern to the United States.

1 (f) During the examination of a witness by a
2 defendant in any criminal proceeding, the United
3 States may object to any question or line of in-
4 quiry that may require the witness to disclose clas-
5 sified information not previously found to be ad-
6 missible in accordance with the procedures estab-
7 lished by this title. Upon such an objection, the
8 court shall take such action to determine whether
9 the response is admissible as will safeguard
10 against the disclosure of any classified informa-
11 tion. Such action may include requiring the
12 United States to provide the court with a proffer
13 of the response of the witness to the question or
14 line of inquiry anticipated by the United States
15 and requiring the defendant to provide the court
16 with a proffer of the nature of the information
17 sought to be elicited.

18 **ALTERNATIVE PROCEDURE FOR DISCLOSURE OF**
19 **CLASSIFIED INFORMATION**

20 SEC. 103. (a) Upon any determination by the
21 court authorizing the disclosure of specific classi-
22 fied information under the procedures established
23 by section 102, the United States may move that, in
24 lieu of the disclosure of such specific classified in-
25 formation, the court order—

1 (1) the substitution for such classified in-
2 formation of a statement admitting relevant
3 facts that the specific classified information
4 would tend to prove; or

5 (2) the substitution for such classified in-
6 formation of a summary of the specific clas-
7 sified information.

8 The court shall grant such a motion of the United
9 States if it finds that the statement or summary
10 will provide the defendant with substantially the
11 same ability to make his defense as would disclo-
12 sure of the specific classified information. The
13 court shall hold a hearing on any motion under
14 this section. Any such hearing shall be held in
15 camera at the request of the Attorney General.

16 (b) The United States may, in connection with
17 a motion under subsection (a), submit to the court
18 an affidavit of the Attorney General certifying
19 that disclosure of the classified information would
20 cause identifiable damage to the national security
21 of the United States and explaining the basis for
22 the classification of such information. If so re-
23 quested by the United States, the court shall exam-
24 ine such affidavit in camera and ex parte.

1 **SEALING OF RECORDS OF IN CAMERA**
2 **PROCEEDINGS**

3 **SEC. 104. If at the close of an in camera pro-**
4 **ceeding under this title (or any portion of a pro-**
5 **ceeding under this title that is held in camera) the**
6 **court determines that the classified information at**
7 **issue may not be disclosed or elicited at the trial**
8 **or any pretrial hearing, the record of such in**
9 **camera proceeding shall be sealed and preserved**
10 **by the court for use in the event of an appeal.**

11 **PROHIBITION ON DISCLOSURE OF CLASSIFIED IN-**
12 **FORMATION BY DEFENDANT, RELIEF FOR DE-**
13 **FENDANT WHEN UNITED STATES OPPOSES DIS-**
14 **CLOSURE**

15 **SEC. 105. (a) Whenever the court denies a**
16 **motion by the United States that it issue an order**
17 **under section 103(a) and the United States files**
18 **with the court an affidavit of the Attorney General**
19 **objecting to disclosure of the classified informa-**
20 **tion at issue, the court shall order that the defend-**
21 **ant not disclose or cause the disclosure of such in-**
22 **formation.**

23 **(b) Whenever a defendant is prevented by an**
24 **order under subsection (a) from disclosing or**
25 **causing the disclosure of classified information,**

1 the court shall dismiss the indictment or informa-
2 tion; except that, when the court determines that
3 the interests of justice would not be served by dis-
4 missal of the indictment or information, the court
5 shall order such other action, in lieu of dismissing
6 the indictment or information, as the court deter-
7 mines is appropriate. Such action may include—

8 (1) dismissing specified counts of the in-
9 dictment or information;

10 (2) finding against the United States on
11 any issue as to which the excluded classified
12 information relates; or

13 (3) striking or precluding all or part of
14 the testimony of a witness.

15 **FAILURE OF DEFENDANT TO PROVIDE PRETRIAL**
16 **NOTICE**

17 **SEC. 106.** If a defendant fails to comply with
18 the notice requirements of subsection (a) or (b) of
19 section 102 and the court finds that the defend-
20 ant's need to disclose or cause the disclosure of
21 the classified information at issue reasonably
22 could have been anticipated before the expiration
23 of the time for giving such notice under such sub-
24 section, the court may prohibit the defendant from
25 disclosing or causing the disclosure of such classi-

1 fied information during trial and may prohibit the
2 examination by the defendant of any witness with
3 respect to any such information.

4 RECIPROCITY; DISCLOSURE BY THE UNITED STATES
5 OF REBUTTAL EVIDENCE

6 SEC. 107. (a) Whenever the court determines,
7 in accordance with the procedures prescribed in
8 section 102, that classified information may be dis-
9 closed in connection with a criminal trial or pre-
10 trial hearing or issues an order pursuant to sec-
11 tion 103(a), the court shall—

12 (1) order the United States to provide the
13 defendant with the information it expects to
14 use to rebut the particular classified informa-
15 tion at issue; and

16 (2) order the United States to provide the
17 defendant with the name and address of any
18 witness it expects to use to rebut the particu-
19 lar classified information at issue if, taking
20 into account the nature and extent of the de-
21 fendant's disclosures, the probability of harm
22 to or intimidation or bribery of a witness,
23 and the probability of identifiable harm to
24 the national security, the court determines
25 that such order is appropriate.

1 (b) If the United States fails to comply with an
2 order under subsection (a), the court, unless it
3 finds that the use at trial of information or a wit-
4 ness reasonably could not have been anticipated,
5 may exclude any evidence not made the subject of
6 a required disclosure and may prohibit the exami-
7 nation by the United States of any witness with
8 respect to such information.

9 (c) Whenever the United States requests a pre-
10 trial proceeding under section 102, the United
11 States, upon request of the defendant, shall pro-
12 vide the defendant with a bill of particulars as to
13 the portions of the indictment or information
14 which the defendant identifies as related to the
15 classified information at issue in the pretrial pro-
16 ceeding. The bill of particulars shall be provided
17 before such proceeding.

18 (d) The provisions of this section shall not
19 apply to classified information provided by the
20 United States to the defendant pursuant to a dis-
21 covery request, unless the court determines that
22 the interests of fairness so require.

23 APPEALS BY THE UNITED STATES

24 SEC. 108. (a) The United States may appeal to
25 a court of appeals before or during trial from any

1 decision or order of a district court in a criminal
2 case requiring or authorizing the production, dis-
3 closure, or use of classified information, imposing
4 sanctions for nondisclosure of classified informa-
5 tion, or denying the issuance of a protective order
6 sought by the United States to prevent the disclo-
7 sure of classified information, if the Attorney
8 General certifies to the district court that the
9 appeal is not taken for purpose of delay.

10 (b)(1) If an appeal under this section is taken
11 before the trial has begun, the appeal shall be
12 taken within ten days after the date of the decision
13 or order appealed from, and the trial shall not
14 commence until the appeal is decided.

15 (2) If an appeal under this section is taken
16 during the trial, the trial court shall adjourn the
17 trial until the appeal is resolved, and the court of
18 appeals (A) shall hear argument on such appeal
19 within four days of the adjournment of the trial,
20 (B) may dispense with written briefs other than
21 the supporting materials previously submitted to
22 the trial court, (C) shall render its decision within
23 four days of argument on appeal, and (D) may dis-
24 pense with the issuance of a written opinion in
25 rendering its decision.

6 PROTECTIVE ORDERS; DISCOVERY; INTRODUCTION
7 OF EVIDENCE

(b) Whenever the court determines pursuant to rule 16 of the Federal Rules of Criminal Procedure that the defendant is entitled to discover or inspect documents or materials containing classified information, the court shall authorize the United States to delete classified information from the documents or materials to be made available to the defendant, to substitute a summary of the classified information, or to substitute a statement admitting relevant facts that the classified information would tend to prove, if the court finds that such action will provide the defendant with sub-

1 stantially the same ability to prepare for trial or
2 make his defense as would disclosure of the specif-
3 ic classified information. The court may permit
4 the United States to make a request for such au-
5 thorization in the form of a written statement to
6 be inspected by the court alone. If the court enters
7 an order granting relief following such an ex parte
8 showing, the entire text of the statement of the
9 United States shall be sealed and preserved in the
10 records of the court to be made available to the
11 appellate court in the event of an appeal.

12 (c) Writings, recordings, and photographs con-
13 taining classified information may be admitted
14 into evidence without change in their classifica-
15 tion status.

16 (d) When a writing or recorded statement (or
17 a part thereof) is introduced into evidence by the
18 United States, the court, upon motion of the de-
19 fendant, may require the United States at that
20 time to introduce any other writing or recorded
21 statement (or any other part of the statement in-
22 troduced) which ought in fairness to be considered
23 contemporaneously with the statement introduced
24 and which is relevant to the defendant's case. If
25 such other writing or recorded statement, or such

1 other part, contains classified information, the
2 court, at the request of the United States, shall
3 conduct the hearing on the defendant's motion in
4 camera. If, at the conclusion of such hearing, the
5 court requires the United States to introduce clas-
6 sified information, the procedures of section 103
7 shall apply.

8 (e) The United States may notify the court and
9 the defendant before trial if it intends to introduce
10 during the trial only a part of a writing or record-
11 ed statement containing classified information.
12 Upon such notification, the court shall conduct,
13 before the trial, an in camera proceeding to make
14 the determinations required by section 109(d).

15 SECURITY PROCEDURES

16 SEC. 110. (a) Within one hundred and twenty
17 days of the date of the enactment of this Act, the
18 Chief Justice of the United States, in consultation
19 with the Attorney General and the Director of
20 Central Intelligence, shall prescribe rules estab-
21 lishing procedures for the protection against un-
22 authorized disclosure of any classified informa-
23 tion in the custody of the United States district
24 courts, courts of appeals, or Supreme Court. Such
25 rules, and any changes in such rules, shall be sub-

1 mitted to the appropriate committees of Congress
2 and shall become effective forty-five days after
3 such submission.

4 (b) Until such time as rules under subsection
5 (a) first become effective, the Federal courts shall
6 in each case involving classified information adopt
7 procedures to protect against the unauthorized
8 disclosure of such information.

9 IDENTIFICATION OF INFORMATION RELATED TO THE
10 NATIONAL DEFENSE

11 SEC. 111. In any prosecution in which the
12 United States must establish as an element of the
13 offense that material relates to the national de-
14 fense or constitutes classified information, the
15 United States shall notify the defendant, at the
16 time of the pretrial conference or, if no such con-
17 ference is held, at a time before trial specified by
18 the court, of the portions of the material that it
19 reasonably expects to rely upon to establish such
20 element of the offense.

21 FUNCTIONS OF ATTORNEY GENERAL MAY BE EXER-
22 CISED BY DEPUTY ATTORNEY GENERAL AND A
23 DESIGNATED ASSISTANT ATTORNEY GENERAL

24 SEC. 112. The functions and duties of the At-
25 torney General under this title may be exercised

1 by the Deputy Attorney General and by an Assist-
2 ant Attorney General designated by the Attorney
3 General for such purpose and may not be delegat-
4 ed to any other official.

5 **DEFINITION**

6 **SEC. 113.** As used in this title, the term "classi-
7 fied information" means information or material
8 that is designated and clearly marked or clearly
9 represented, pursuant to the provisions of a stat-
10 ute or Executive order (or a regulation or order
11 issued pursuant to a statute or Executive order),
12 as information requiring a specific degree of pro-
13 tection against unauthorized disclosure for rea-
14 sons of national security or any Restricted Data,
15 as defined in section 11 y. of the Atomic Energy
16 Act of 1954 (42 U.S.C. 2014(y)).

17 **TITLE II—GUIDELINES AND REPORTS**

18 **GUIDELINES PRESCRIBED BY THE ATTORNEY**

19 **GENERAL**

20 **SEC. 201.** Within ninety days of the date of the
21 enactment of this Act, the Attorney General shall
22 issue guidelines specifying the factors to be used
23 by the Department of Justice in deciding whether
24 to prosecute a violation of Federal law in which
25 there is a possibility that classified information

1 will be disclosed. Such guidelines shall be prompt-
2 ly transmitted to the appropriate committees of
3 the Congress.

4 ANNUAL REPORT TO CONGRESS BY THE ATTORNEY
5 GENERAL

6 SEC. 202. The Attorney General shall report to
7 the Select Committee on Intelligence of the
8 Senate, the Permanent Select Committee on Intel-
9 ligence of the House of Representatives, and the
10 chairmen and ranking minority members of the
11 Committees on the Judiciary of the Senate and the
12 House of Representatives once each year concern-
13 ing the operation and effectiveness of this Act.
14 Such report shall include summaries of those
15 cases in which a decision not to prosecute or not
16 to continue a prosecution was made because of the
17 possibility that classified information would be
18 disclosed.

19 TITLE III—EFFECTIVE DATE

20 SEC. 301. The provisions of this Act shall
21 become effective upon the date of the enactment
22 of this Act, but shall not apply to any prosecution
23 in which an indictment or information was filed
24 before such date.

Union Calendar No. 813

96TH CONGRESS
2D SESSION

H. R. 4736

[Report No. 96-831, Parts I and II]

A BILL

To establish certain pretrial and trial procedures for the use of classified information in connection with Federal criminal cases, and for other purposes.

JULY 11, 1979

Referred jointly to the Committee on the Judiciary and the Permanent Select Committee on Intelligence

MARCH 18, 1980

Reported from the Permanent Select Committee on Intelligence with an amendment

SEPTEMBER 17, 1980

Reported from the Committee on the Judiciary with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed